No. 80-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TELTRONICS SERVICES, INC.,

Petitioner,

—against—

L M ERICSSON TELECOMMUNICATIONS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION FOR EXPEDITED CONSIDERATION

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Question Presented

Did the Court of Appeals err in adhering to settled *res judicata* principles when (i) all parties agreed that the criteria for *res judicata* were satisfied, and (ii) there was no special reason in this case why normal principles of *res judicata* should not be applied?*

Federal Rules Involved

The pertinent portion of Rule 41(b) of the Federal Rules of Civil Procedure is reproduced at page 9 of the petition. The text of Rule 60(b) of the Federal Rules of Civil Procedure is set out in the appendix to this brief.

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* In addition to the parties named in the caption, Jules J. Hessen, as trustee in bankruptcy of petitioner Teltronics Services, Inc., was a party in the Court of Appeals.

Respondent L M Ericsson Telecommunications, Inc. is a wholly-owned subsidiary of Anaconda-Ericsson Inc., a corporation owned by The Anaconda Company, a wholly-owned subsidiary of Atlantic Richfield Company, and Telefonaktiebolaget L M Ericsson, a Swedish corporation. Telefonaktiebolaget L M Ericsson has many affiliates and partially owned subsidiaries worldwide, some of which could be considered affiliates of respondent. If the Court wishes, respondent will supplement this listing with the names of these companies.

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IN THE

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October Term, 1980

No. 80-1491

TELTRONICS SERVICES, INC.,

Petitioner,

—against—

L M ERICSSON TELECOMMUNICATIONS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION FOR EXPEDITED CONSIDERATION

Defendant-respondent L M Ericsson Telecommunications, Inc. submits this brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (a1-14)* and to petitioner's motion for expedited consideration, a *de facto* request for consolidation with *Federated Department Stores, Inc.* v. *Moitie,* No. 79-1517, *cert. granted* Nov. 17, 1980.**

* The appendices bound with the petition are cited as "a", the petition as "pet."

** Ericsson reserves its right to submit a brief on the merits should certiorari be granted.

Statement of the Case

The record of proceedings in the District Court, and the factual background of this litigation, are recounted faithfully and in detail in the unanimous opinion of the Court of Appeals (a3-8).* Several aspects of the case, none of which is seriously disputed, illustrate why certiorari is inappropriate:

First, as found by both the District Court (a18) and the Court of Appeals (a5), petitioner "had ample *opportunity* to present its antitrust claim in the [first] action" (emphasis in original). The same antitrust claim which petitioner now seeks to relitigate was pleaded, used as a principal basis for attempted injunctive relief, and briefed and argued on the motion to dismiss, in the first action.** Indeed, petitioner acknowledged in the Court of Appeals (a8), and acknowledges in this Court (pet. 32), that all criteria of *res judicata* have been met.

Second, the record reveals no excuse for Teltronics' failure to pursue any of the well recognized remedies for disagreement with the District Court's order dismissing its first complaint, such as a motion for leave to amend (Fed. R. Civ. P. 15(a)), a motion for relief from judgment under Fed. R. Civ. P. 60(b), or a one-page notice of appeal. Petitioner's conjecture (pet. 21-22) that Teltronics lacked funds to continue the litigation is not a basis for relief from *res judicata,**** and is belied by the record.†

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* Petitioner has misstated several facts in presenting the case to this Court. Though of marginal relevance, one must be corrected. Contrary to petitioner's description (pet. 13, 27), no document or other evidence offered by petitioner has ever "confirmed" or even identified any fraudulent conduct by Ericsson.

** The record contradicts petitioner's contrary assertion. *See, e.g.,* a4, 5.

*** *E.g., Rinieri* v. *News Syndicate Co.,* 385 F.2d 818 (2d Cir. 1967).

† For example, Teltronics was able to engage new attorneys to bring a second action within two months after dismisssal of the first, one month before its Chapter XI filing (a4, 7).

Third, the District Court found (a16) that Teltronics' fraudulent conduct in federal court, including conduct directly related to the institution of its second action against Ericsson, rendered it undeserving of any relief from the normal application of *res judicata.*

Far from presenting a burning issue, this case involves an altogether ordinary *res judicata* ruling that has no bearing on the *Moitie* case pending before this Court.

Reasons for Denying the Writ

I.

This Case Does Not Conflict With the Ninth Circuit's Decision in *Moitie* or Any Other Circuit Court Decision.

In *Moitie,** the District Court had dismissed seven consolidated antitrust class actions on the ground that the plaintiffs, as retail purchasers, were not persons injured in their "business or property" under Section 4 of the Clayton Act, 15 U.S.C. § 15, and hence lacked standing to sue for damages under the antitrust laws. Five of the plaintiffs appealed; two did not. While the appeal was pending, this Court decided *Reiter* v. *Sonotone Corp.,* 442 U.S. 330 (1979), which substantially undermined the basis for the District Court's dismissal. The Court of Appeals summarily reversed the judgment of dismissal and remanded to the District Court.** The non-appealing plaintiffs, meanwhile, had commenced new actions with substantially similar allegations in state court. These were first removed, then dis-

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* The opinion of the Court of Appeals in *Moitie* is reported at 611 F.2d 1267 (9th Cir. 1980).

** *Weinstein* v. *Federated Department Stores, Inc.,* 608 F.2d 1374 (9th Cir. 1979), *reversing* 426 F.Supp. 880 (N.D. Cal. 1977).

missed as barred by *res judicata.* On appeal from the second dismissal, the Court of Appeals reversed, holding that, because of the intervening change in the applicable law and the reversal as to the other five plaintiffs, the prior, unappealed judgments did not bar the new actions. (611 F.2d at 1269-1270).

Both *Moitie* and this action are antitrust cases generally involving *res judicata,* but the similarity ends there. Two obvious distinctions show why there is no need to consider the two cases together and why certiorari is unwarranted in this action.

First, in *Moitie,* this Court's clarification of antitrust standing in *Reiter* v. *Sonotone Corp., supra,* worked a significant change in the basis for the District Court's dismissal of the first action. That is not true of this case. There is no claim here that an intervening change in law wiped away the predicate for the first dismissal. In this case the argument is (pet. 20-21, 29) that if Teltronics had engaged better lawyers or had more money to pursue its complaint there might never have been a first dismissal at all. Here there is no conflict with the principle established by this Court that a change in governing law ordinarily provides no basis for departure from *res judicata.**

Second, the Court of Appeals in *Moitie* stressed the fact that the judgment dismissing the first actions had been reversed as to the appealing plaintiffs, and, citing its power to reverse judgments against non-appealing plaintiffs, concluded that "substantial justice" required departure from *res judicata* (611 F.2d at 1269-1270). This factual setting, and the Ninth Circuit's reasoning, brought the *Moitie* deci-

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* *E.g., Angel* v. *Bullington,* 330 U.S. 183 (1947); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940); *Wilson's Executor* v. *Deen,* 121 U.S. 525 (1887).

sion directly into conflict with another line of authority from this Court holding that a party who does not appeal from an adverse judgment is bound by that judgment even if a closely related or consolidated judgment is subsequently reversed on appeal.* This conflict was emphasized in the petition for certiorari in the *Moitie* case.** This case presents no such conflict.

Petitioner claims that the Second Circuit's decision in this case clashes with *Moitie* on the issue of whether "considerations of equity and public policy," particularly the public policies of the antitrust laws, justify a second day in court on the same claim (pet. 28-30). But on the legal issue, the two courts are in agreement. The Second Circuit in this action expressly recognized that *res judicata* "is not to be mechanically applied" (a11), as did the Ninth Circuit in *Moitie* (611 F.2d at 1269-1270). The distinction between the two cases, fatal to the petition for certiorari, is that the facts of this case did not justify departure from *res judicata*.***

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* *E.g., Ackerman* v. *United States*, 340 U.S. 193 (1950); *Reed* v. *Allen*, 286 U.S. 191 (1932).

** The question presented in *Moitie* is "whether those non-appealing plaintiffs can evade the *res judicata* effects of the dismissal of their first complaints merely because the plaintiffs in the other five actions did appeal and obtained a reversal of their own dismissals based on a subsequent decision of this Court in an unrelated case." *Moitie* petition for certiorari, at 2.

*** Except for the alleged similarity between the two actions, petitioner has advanced no compelling reason why, even if the petition be granted, the two cases must be heard together, and has pointed to nothing in this case which might add to the Court's consideration of the question presented in *Moitie*. For this reason alone, the motion for expedited consideration should be denied.

II.

This Case Is Unworthy of Consideration By This Court on Any Other Ground.

As noted, the decision of the Court of Appeals conforms to sound precedent from this and other courts. The claimed conflict with *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 (1944) (pet. 31-32), vanishes on analysis. *Mercoid* involved primarily the antitrust ramifications of use of a combination patent to protect unpatented elements from competition. In an earlier action involving the same patent, Mercoid had not interposed, as a defense or counterclaim, a claim of misuse of the patent or antitrust violations. This Court held that, notwithstanding its failure to do so in the first action, Mercoid could tender these as defenses *to the equitable relief* sought by the patentee in the second action (320 U.S. at 670), and that, at law, "[t]hough Mercoid were barred . . . from asserting any defense which might have been interposed in the earlier litigation," failure to assert a counterclaim in the prior suit did not, under Fed. R. Civ. P. 13(b) "render[] the prior judgment *res judicata* as respects it" (*id.* at 671; citations omitted). *Mercoid* does not stand for the proposition that an unsuccessful litigant may invoke the "public policies" of the antitrust laws as a talisman against a valid *res judicata* defense.

Earlier this Term this Court stated:

> "As this Court and other courts have often recognized, *res judicata* and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 49 U.S.L.W. 4015,

4017 (Dec. 9, 1980), *citing Montana* v. *United States*, 440 U.S. 147, 153-154.

The decision of the Court of Appeals in this case honors this rationale of *res judicata* and is fully consistent with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari and motion for expedited consideration should be denied.

Respectfully submitted,

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March 5, 1981

APPENDIX

Rule 60(b), Federal Rules of Civil Procedure

RELIEF FROM JUDGMENT OR ORDER

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.